Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JANET GREENWELL,

Petitioner,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER NEGLIGENCE CAUSING THE INITIAL AGGRAVATION OR RECURRENCE OF AN INJURY OR ILLNESS SUSTAINED IN THE SERVICE OF THE SHIP IS REQUIRED FOR THE OPERATIONAL ACTIVITY DOCTRINE TO IMPUTE NEGLIGENCE ON A JONES ACT EMPLOYER FOR THE NEGLIGENCE OF A DOCTOR IT SELECTS TO ADMINISTER CURE?

II. ALTERNATIVELY, WHETHER THE OPERATIONAL ACTIVITY DOCTRINE IMPUTED NEGLIGENCE ON A JONES ACT EMPLOYER FOR THE NEGLIGENCE OF A DOCTOR IT SELECTS TO ADMINISTER MEDICAL TREATMENT TO A CREWMEMBER FOR A NON-WORK RELATED MEDICAL CONDITION?

LIST OF PARTIES

Petitioner Janet Greenwell filed a lawsuit against Respondent Aztar Indiana Gaming Corporation, d/b/a Aztar Casino, and Respondent Aztar brought a third-party action versus Drs. Matthew B. Kern, M.D. and Gregory J. Loomis, M.D. Therefore, Drs. Kern and Loomis are also being served as Respondents.

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Petitioner Plaintiff, Janet Greenwell ("Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

1. The district court's *sua sponte* dismissal of Petitioner Jones Act/malpractice cause of action on September 21, 2000 is reproduced at App. B.

2. The opinion of the Seventh Circuit is reported at 268 F.3d 486 (7th Cir. 2001) and is reproduced at App. A.

3. The November 16, 2001, Order denying Petitioner's Petition for Rehearing and/or Rehearing En Banc, is reproduced at App. C.

STATEMENT OF JURISDICTION

The Seventh Circuit's Judgment was entered on October 4, 2001, and the Order denying Petitioner's Petition for Rehearing and/or Rehearing En Banc was entered on November 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Jones Act, 46 U.S.C. App. § 688 provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes

> of the United States, modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court in which the defendant employer resides or in which his principle office is located.

INTRODUCTION

At issue in this case is whether the operational activity doctrine (the "Doctrine") – holding a seaman's employer liable for the negligence of a third party performing operational activities of the employer – applies to an employer's obligation to provide cure, even if the underlying injury or illness incurred in the service of the ship is not alleged to be negligently caused, and is an aggravation or recurrence of a prior condition, or, alternatively, whether a valid claim exists under the Jones Act for damages caused by the negligence of a physician selected by the shipowner to treat a crewmember ailing from a non-work related condition.

In its October 4, 2001 Opinion, the Seventh Circuit refused to apply the Doctrine to an employer's cure obligation, despite the Respondent employer having selected the allegedly negligent physician. Also, the Respondent employer admitted that its payment to the offending physician

was made pursuant to its cure obligation owing the Petitioner. The Seventh Circuit premised its holding on the fact that Petitioner testified that she had previous back problems, and had amended her complaint to voluntarily dismiss her claim that the Respondent employer's negligence caused the underlying slip and/or trip at work for which Respondent thereafter selected the physicians for treatment.

Supreme Court review is warranted as the Seventh Circuit's opinion conflicts not only with established precedent in the Seventh Circuit, but also of this Court, i.e. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, *rehearing denied*, 356 U.S. 978 (1958); *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *Farrell v. United States*, 336 U.S. 511(1949).

Moreover, the Doctrine is the subject of another Petition for a Writ of Certiorari before this Court in *Diamond Jo Casino v. Rannals*, No. 01-876. Should this Court grant Certiorari in that case, it is respectfully submitted those appeals should be consolidated.

STATEMENT OF THE CASE

A. FACTS UNDERLYING LAWSUIT

In 1997, Petitioner Plaintiff was employed by the Respondent employer as a crewmember on its vessel, the CITY OF EVANSVILLE. In June, 1997, Petitioner suffered an injury in the service of the ship, to her back, aggravating or causing a recurrence of a preexisting condition, and was thereafter diagnosed with having a 50 percent slippage of

her L5 vertebrae over S1 (a condition called Grade II spondylolisthesis) and a degenerated and bulging/herniated disc at that level.

The Respondent employer forced Petitioner to treat with physicians of Respondent employer's choosing and required her to sign a document indicating that she was required to see Respondent's chosen doctors or she would be responsible for the medical bills herself. Searching for a rationale to support this result, Judge Posner's statement that the Respondent employer merely "referred" Petitioner to the doctor grossly understates the proposition. Thereafter, the Respondent employer's chosen doctors, Loomis and Kern, recommended Greenwell undergo surgery to fuse the L5-S1 disc. When Petitioner Greenwell requested treatment and/or a second opinion from another neurosurgeon in the area, the Respondent employer refused the request. Thereafter, Drs. Loomis and Kern performed the surgery but at the wrong level (L4-5) and thus failed to achieve the necessary fusion.

Respondent having paid for the offending surgery pursuant to its cure obligation: its Claim Manager stated in an affidavit that:

> "From June 17, 1997, until July 1998, Aztar paid [Petitioner] Greenwell a total of . . . $49,962.16 *in cure* (payment of medical expenses) for treatment for her low back *including her surgical fusion at L5-S1*. . . ."

(Emphasis added) (Affidavit of Aztar's claims manager). Nevertheless, the Seventh Circuit refused to acknowledge application of the Operational Activity Doctrine.

B. PROCEDURAL HISTORY IN DISTRICT COURT

Because of the negligence of the Respondent employer's chosen doctors and its fraud and false representations as to what doctors Greenwell could and could not treat with, the First Amended Complaint against Respondent alleged Malpractice (Count II), Fraud (Count III) and Negligent Representation (Count IV). The Malpractice count alleges:

> 5. Defendant selected Dr. Matthew B. Kern and Gregory J. Loomis to treat Plaintiff, with the former assuming primary care for the operative procedure performed on or about August 18, 1997, whereby in the process thereof, in breach of the applicable standard of care, said physician(s) did perform surgical procedures at the wrong level (L4-5) as opposed to L5-S1, resulting in instability and slippage of the spine; moreover, prior thereto, the standard of care was breached in said physician(s) not requiring that Plaintiff stop smoking prior to the surgical procedure and to test for same *via* appropriate screening.

Upon leave to file the First Amended Complaint being granted, in promotion of litigational efficiency and economy, Petitioner voluntarily dismissed Count I (paragraph 4 only) of the Complaint which alleged that the Respondent employer negligently caused the injuries of June 17, 1997 and August 14, 1997, incurred in the service of the ship, that then led to the negligent treatment referenced in Paragraph 5 of the First Amended Complaint.

Thereafter, the Respondent employer filed a Third-Party Complaint against Drs. Loomis and Kerns seeking contribution and/or indemnity. Drs. Loomis and Kern filed motions to dismiss on the grounds that the district court did not have jurisdiction over the Respondent employer's third party claims and that those third party claims were somehow premature because the Indiana Medical Malpractice Act required that the claims must first be reviewed by a medical review panel.

On September 21, 2000, the district court granted Third-Party Defendants Loomis and Kerns motion and *sua sponte* dismissed Count II (malpractice) of the First Amended Complaint without prejudice erroneously based on a claim of lack of supplemental jurisdiction. App. B. These decisions were then appealed to the Seventh Circuit by the Respondent employer and Petitioner.

C. PROCEEDINGS IN SEVENTH CIRCUIT

On November 8, 2000 the Seventh Circuit consolidated the two appeals and set a briefing schedule that did not allow for Petitioner filing a Reply Brief. In its opening Brief [filed after the extension], the Respondent employer never addressed the *sua sponte* dismissal of Petitioner's Jones Act/ malpractice claim. Petitioner's Brief on Appeal addressed the district court's erroneous holding that it did not have original jurisdiction over the case because Petitioner did not follow the Indiana State Medical Malpractice Act. Petitioner prevailed on that issue in the Seventh Circuit. The Respondent employer's Reply Brief [filed after extension on July 19, 2001], responded to Petitioner's opening Brief by raising new issues and matters.

The Seventh Circuit's briefing schedule order not having provided for reply brief by Petitioner, she consequently filed a Motion for Leave to File a Reply Brief which the Seventh Circuit inexplicably denied. The Seventh Circuit Decision of October 4, 2001, adopted the Respondent employer's arguments in its Reply Brief which Petitioner Greenwell was precluded from responding to. Thus, Petitioner lost in both the district and circuit courts without ever having a chance to address the prevailing rationales.

Pertinent to this Writ of Certiorari, Judge Posner wrote:

> Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure, because the malpractice would have been committed by a fellow employee acting within the scope of his employment. *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665-69 (1943); *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679-80. Even if the doctor had been an independent contractor hired by Aztar to discharge the "cure" part of Aztar's duty of maintenance and cure, rather than an employee, Aztar would have been liable, as explained in *Id.* at 680. But after admitting in her deposition that she had been seeing a chiropractor about her back before experiencing back pain onboard the ship, she amended her complaint to drop the

> charge that she had been injured at work and charged instead that Aztar had either directed her to use the incompetent doctors who operated on her or had fraudulently induced or otherwise improperly compelled her to use them. . . .

App. A, pp. 3a-4a.

> Remember that Greenwell initially charged that she had been injured at work. That would have brought the case within range, at least, of the doctrine of maintenance and cure. When she dropped that charge, her claim of maintenance and cure evaporated, because the duty of cure is limited to injuries and illnesses that occur on the job. But it evaporated because of a failure of proof, not because of a failure of jurisdiction.

App. A, p. 9a.

> As for Greenwell's claim under the Jones Act, a claim within the federal-question jurisdiction of the district court, it too evaporated because of facts that emerged after the complaint was filed: that the doctors who operated on her were neither employees of the Defendant nor acting on behalf of Aztar, thus eliminating any basis for vicarious liability, and that Aztar was not negligent in selecting them, thus eliminating any basis for holding it directly liable for the consequences of the operation on Greenwell's back. More fundamentally, the Jones Act, like the doctrine of maintenance and cure, *Braen v. Pfeiffer Oil Transportation Co.*, 361 U.S. 129, 132-33 (1959),

> is limited to injuries that occur "in the course of [the seaman's] employment."

46 U.S.C. App. § 688(a) and Greenwell did not, App. A, p. 9a.

Petitioner did not disavow or drop the allegations that this action was given rise to in the service of a ship (allegation 3, First Amended Complaint); she only dropped the charge of shipboard negligence. Defendant admitted that it paid for the negligent surgery as part of its cure obligation. Since the surgery had been paid for as cure by the Respondent employer, there was no viable claim for that cure but did not negate that the injury or illness had been sustained in the service of the ship.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S UNPRECEDENTED OPINION MAKES A SEAMAN'S ENTITLEMENT TO MAINTENANCE AND CURE CONDITIONAL UPON A FINDING OF NEGLIGENCE AND/OR "NEW" INJURIES, AS OPPOSED TO AGGRAVATION OR RECURRENCE OF INJURIES THAT OCCUR IN THE SERVICE OF THE SHIP; THUS REPUDIATING YEARS OF PRECEDENT AND THE WHOLE PURPOSE OF MAINTENANCE AND CURE.

A. CURE IS PAYABLE FOR INJURIES OR ILLNESSES SUSTAINED IN THE SERVICE OF THE SHIP.

"Cure" involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman until the point of "maximum cure." *Pelotto v. L & N Towing, Co.*, 604 F.2d 396, 400 (5th Cir. 1979). Such duty arises from the seaman's disability, not from the fault of either party. *Petition of Atlass*, 350 F.2d 592, 595 (7th Cir. 1965). A maintenance and cure claim is separate from a Jones Act claim. *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616 (6th Cir. 2000); *Smith v. Lykes Brothers-Ripley S.S. Co.*, 105 F.2d 604, 606 (5th Cir. 1939) and arises from the context of the employment relationship, and not from any negligence or fault on the part of the vessel. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).

A shipowner's obligation to pay maintenance and cure stems from two basic policy concerns recognized by maritime

law for hundreds of years, i.e. (1) the well being of seamen aboard ship and in foreign ports, and (2) the importance of a capable merchant marine to the economic and military security of a nation. See Martin J. Norris, *The Law of Seamen*, Sec. 26:4 (1985); *See also Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975) (stating that the duty to pay maintenance and cure encourages maritime commerce and assures the well being of seamen). It has been explained to be "[a]mong the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors . . ." . *Hughes v. Hunter Marine Transport, Inc.*, 1998 A.M.C. 6,7 (M.D. Tenn. 1997). Seamen rely on it as an alternative to workers' compensation. *Blainey v. American Steamship Co.*, 990 F.2d 885, 886 (6th Cir. 1993).

Contrary to the underlying rationale of Judge Posner , this obligation to pay cure is not contingent upon a "new" or fault related injury occurring while working on a vessel but can arise out of a prior medical condition or illness that recurs, *Breese v. AWI, Inc.*, 823 F.2d 100 (5th Cir. 1987); *Sammon v. Central Gulf S.S. Corp.*, 442 F.2d 1028 (2d Cir. 1971) or that is aggravated in the service of the ship. *Smith v. Apex Towing Co.*, 949 F. Supp. 667, 671 (N.D. Ill. 1997).

B. CURE IS NOT CONTINGENT UPON NEGLIGENCE.

Fault causing the underlying injury is not required for the employer to be obligated to pay cure, *Sulentich v. Interlake Steamship Co.*, 257, F.2d 316, 320 (7th Cir. 1985), nor is it required for application of the operational activity doctrine *sans* maintenance and cure. *Mangrum v. Union Pacific Railroad Co.*, 120 Cal. App. 2nd 960, 978, 41 Cal.

Rptr. 536, 548, 16 ALR 3rd 543 (Dt. Ct. App. 1964). For example, in *Rowald v. Cargo Carriers, Inc.*, 243 F. Supp. 629 (E.D. Mo. 1965), the court, in deciding whether defendant was liable for maintenance and cure benefits, held as follows:

> While the instant disability of libelant is unrelated to and not caused by his employment, it manifested itself first while he was employed on a 30 day off period but still a member of the crew. Applying the principles of *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938) and *Farrell v. United States*, 336 U.S. 1949, this court finds the respondent is responsible for maintenance and cure under these circumstances.

Contrary to the Seventh Circuit decision in this case, Petitioner's voluntary dismissal of Count I (negligence causing slip, and trip) did not drop the charge that she sustained an injury in the service of the ship (Allegation 3, First Amended Complaint) or somehow undercut the malpractice alleged in Count II. Judge Posner erroneously read too much into the voluntary dismissal of Count I and without record support, impermissibly reasoned that Petitioner Greenwell dismissed Count I because a pre-existing condition was involved. Damages for aggravation of an underlying condition, however, are recoverable under the Jones Act. *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 601 (1st Cir. 1996). Dismissal of Count I did not disavow that the aggravation or recurrence of Petitioner's back condition that necessitated surgery occurred in the service of the ship or that the Respondent employer remained liable under the

Operational Activity Doctrine for the medical treatment Defendant selected for Petitioner ostensibly pursuant to its cure obligation.

C. FAILURE TO APPLY THE OPERATIONAL ACTIVITY DOCTRINE EVISCERATES CLEAR SEVENTH CIRCUIT AND SUPREME COURT PRECEDENT.

In *Hopson v. Texaco*, 383 U.S. 262 (1966), this Court undertook to adjust the expense of injury equitably between the worker and employer. The Court also stated that justice demands that one who gives his labor to the furtherance of the enterprise should be assured that *all* combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered, and gave an accommodating scope to the word "agents". *Id.* at 264.

Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932) long ago held that a shipowner is liable in tort for failing to provide a seaman "proper and adequate" medical attention and equates such a failure to a failure to rescue a seaman who has "fallen into the sea." *Id.* at 377; *see also DeZon v. American President Lines, Ltd.*, 318 U.S. 660 (1943). This duty extends to shoreside physicians selected by the employer, see *Central Gulf S.S. Corp. v. Sambula*, 405 F.2d 291 (C.A. Tex. 1968) and its progeny.

In *Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994), the Seventh Circuit correctly found it to be established law that "[o]nce an employer undertakes to provide medical attention it must do so in a non-negligent manner", and that an employer selected doctor was an agent.

Id. at n.3.[1] Federal courts have consistently recognized that principle, which is based on the operational activity doctrine described in *Hopson*, *supra*; *Central Gulf S.S. Corp. v. Sambula*, *supra* at 302; *See also Rannals v. Diamond Jo Casino*, 265 F.3d 442, (6th Cir. 2001) (Petition for Certiorari pending); *Fletcher v. Union Pacific R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980).

Operational activity "has a broad meaning", applying to activities that are "characteristic to the business." *Austin v. Soo Line Railroad Co.*, 1996 W.L. 539123 *3 (N.D. Ill. 1986). An accommodating scope must be given to the term "agent". *Schroeder v. Pennsylvania Railroad Company*, 397 F.2d 452, 458 (7th Cir. 1968).

Here, Petitioner Greenwell alleged [and testified] that Respondent employer told her that it had "the right to determine the place of medical treatment", and "selected Dr. Matthew B. Kern" who negligently performed surgery, First Amended Complaint allegations 5-7. " '[I]t would violate the notions of fair play for [an employer] to encourage its employees to [perform a particular activity away from its premises] and then escape liability for injuries suffered by its workers as a result of the poor quality of the facilities it encouraged them to use." *Rannals v. Diamond Jo Casino*, *supra*, 265 F.3d at 449.

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1. *Fulk* involved a railroad employee who had a pre-existing condition (high blood pressure), who suffered a fatal ventricular erythema while on the job and argued that the employer had a duty to compel him to submit to further medical treatments after it ordered a pre-employment physical conducted by his private physician. While acknowledging the established law aforesaid, the Seventh Circuit rightfully refused to extend the duty to require an employer to oversee an employee's compliance with doctor's orders. Here, likewise, we have a pre-existing condition that worsened on the job, *but*, it was the medical treatment itself that was deficient.

1. In Selecting Dr. Kern To Discharge Defendant's Cure Obligation, Respondent Employer Was Engaged In An Operational Activity, i.e., The Payment Of Cure.

Respondent's claims manager swore that:

> From June 17, 1997, until July 1998, Aztar paid [Petitioner] Greenwell a total of . . . $49,962.16 in cure (payment of medical expenses) for treatment for her low back including her surgical fusion at L5-S1 . . .

(Affidavit of Aztar's claims manager).

While failing to acknowledge that affidavit's attestation to the fact that the allegedly negligent treatment was obviously committed as part of Respondent employer's discharge of its cure obligation, Judge Posner nevertheless stated that "if the doctor had been an independent contractor hired by Aztar to discharge the 'cure' part of Aztar's duty of maintenance and cure, . . . Aztar would have been liable . . . .". As demonstrated by the above referenced affidavit however, *the only evidence before the Seventh Circuit was that Dr. Kern was an independent doctor hired by Respondent to discharge its cure obligation*!

2. Keeping A Crew Healthy Is An Operational Activity.

Even if Dr. Kern had been selected by Respondent employer to treat a non-work related condition, Respondent's liability would still fall within the Doctrine. In *Mangrum v. Union Pacific Railroad Co., supra*, a railway employee –

not covered by maintenance and cure – became ill during the course of his employment. The employer selected a doctor who misdiagnosed bronchitis. The plaintiff employee later died from pneumonia, and an FELA action was commenced alleging malpractice/misdiagnosis. An on-the-job injury caused by negligence did not cause the underlying misdiagnosed condition. The Court, nevertheless, found that the employer selected doctor was performing an operational activity on behalf of the railroad because "a railroad cannot operate properly without a full healthy crew aboard a train". *Id.*, at 230 Cal. App. 2nd 978. Here, Petitioner's back pain arose in the course of her employment on the vessel and the Respondent employer selected the doctor who committed the malpractice. The Respondent employer cannot operate without a full healthy crew aboard. Thus, the doctor selected by the Respondent employer was performing an operational activity in trying to make the Petitioner healthy.

II.

THE SCOPE OF APPLICATION OF THE OPERATIONAL ACTIVITY DOCTRINE IS INVOLVED IN A PETITION FOR CERTIORARI IN DIAMOND JO CASINO V DAWN RANNALS, NO. 01-876; THIS CASE SHOULD PROCEED AS A COMPANION CASE.

Supreme Court Rule 27(3) states, "The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe." In this case, the main issue to be decided by this Court is the scope of application of the Operational Activity Doctrine. This very same issue is pending on a Writ of Certiorari in the case of *Diamond Jo Casino v. Rannals*,

No. 01-876, a case in which the plaintiff respondent prevailed in the Sixth Circuit under the Operational Activity Doctrine as it applied to a maritime employer's liability for accidents which occurred at safety training courses conducted by the Department of Transportation and United States Coast Guard. As both cases involve the scope of application of the same Doctrine, Plaintiff requests they proceed as companion cases should Writs of Certiorari be granted for a more full delineation of the intended application of the Doctrine.

CONCLUSION

A maritime employer's duty to provide cure to injured or ill seamen is part of that employer's operational activities and encourages maritime commerce and assures the well-being of seamen. By refusing to acknowledge the application of this doctrine in the absence of negligence or simply because a seaman's injury was pre-existing is contrary to the entire rationale behind a maritime employer's obligation to provide cure and existing Supreme Court and Seventh Circuit precedent. For all the foregoing reasons, Petitioner Greenwell respectfully requests her Writ of Certiorari be granted.

Respectfully submitted,

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